Supreme Court, U.S.
FILED
SEP 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-372

In The

Supreme Court of the United States

October Term, 1985

ELAINE CHRISTENSEN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD E. OLSON, JR.
NEVADA INDIAN-RURAL LEGAL SERVICES
600 East William Street, Suite 301
Carson City, Nevada 89701
Telephone: (702) 885-5110

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Did the codification in the 1948 Judicial Code of the six-year statute of limitations for certain actions against the United States formerly found in a subsection of the 1940 Judicial Code extend that statute of limitations to actions relating to Indian allotments, which were not subject to any statute of limitations prior to the adoption of the Judicial Code of 1948?

PARTIES

The parties before the Court of Appeals in the proceeding below are: Elaine Christensen, Orville Brown, the estate of Doran Pete, and the estate of Gladys Walker, each of whom holds an undivided interest in the Indian allotment which is the subject matter of this litigation[1] and who are referred to herein as the allotment interest-holders, the Petitioners herein; and the United States of America and the Secretary of the Interior in his official capacity, the Respondents herein.

---

[1] Doran Pete and Gladys Walker, plaintiffs in the proceedings before the District Court for the District of Nevada, have died during the pendency of this litigation. Determination of the successors to the interests of Doran Pete and Gladys Walker in the Martinez Indian allotment, the subject matter of this litigation, will be made in probate proceedings conducted by the Secretary of the Interior pursuant to 25 U.S.C. §§ 372 and 373 and 43 C.F.R. § 4.200 *et seq.* However, these provisions do not contemplate the appointment of a personal representative or executor in such proceedings; therefore, substitution of such a personal representative or successor at this time is impossible, and this proceeding is brought in the names of the original parties. Leave to substitute the respective successors in interest to the deceased parties will be sought pursuant to Rule 40.1, after those successors are determined by the Secretary of the Interior.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. The Decision Below Directly Conflicts With Decisions Of The Eighth Circuit Court of Appeals	6
II. The Court Below Disregarded The Derivation And Legislative History Of 28 U.S.C. § 2401(a) Which Demonstrate That This Statute Is Not Applicable To Actions Brought Pursuant To 25 U.S.C. §§ 345-346	7
CONCLUSION	11
Appendix A	App. 1
Appendix B	App. 6
Appendix C	App. 11
Appendix D	App. 12

TABLE OF AUTHORITIES

Page

CASES CITED

Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 (1912) 10

Antoine v. United States, 710 F.2d 477 (8th Cir. 1983) 6

Begay v. Albers, 721 F.2d 1274 (10th Cir. 1983) 6

Christensen v. United States, 575 F. Supp. 735 (D. Nev. 1983) 5

Ewert v. Bluejacket, 259 U.S. 129 (1922) 11

Hemmer v. United States, 204 F. 898 (8th Cir. 1912), *aff'd*, 241 U.S. 379 (1916) 10

McDonald v. Hovey, 110 U.S. 619 (1884) 10

Morton v. Mancari, 417 U.S. 535 (1974) 10

Mottaz v. United States, 753 F.2d 71 (8th Cir. 1985) 6

Oneida County, N.Y. v. Oneida Indian Nation, 105 S.Ct. 1245 (1985) 11

Sampson v. United States, 533 F.2d 499 (9th Cir. 1976) 7

Squire v. Capoeman, 351 U.S. 1 (1956) 10

United States v. Ryder, 110 U.S. 729 (1884) 10

Vincenti v. United States, 470 F.2d 845 (10th Cir. 1972), *cert. dismissed*, 414 U.S. 1057 (1973) 6

STATUTES CITED

25 U.S.C. §§ 345-346 ..... 3, 4, 5, 6, 7, 8, 9, 10

25 U.S.C. § 348 4

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 1346 ..... 8, 9

28 U.S.C. § 1353 9

28 U.S.C. § 2401(a) 3, 5, 6, 7, 8, 9, 11

28 U.S.C. § 41(20) (1940 Ed.) 3, 7, 8, 9, 10

28 U.S.C. § 41(24) (1940 Ed.) 3, 8, 9

OTHER AUTHORITIES

Barron, *The Judicial Code*, 8 F.R.D. 439 (1949) 10

F. Cohen, *Handbook of Federal Indian Law*, (1982 Ed.) 8

H.R. 3214, 80th Cong., 1st Sess. (1947) 7, 9

H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 7, 9

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

ELAINE CHRISTENSEN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

The Petitioners Christensen, Brown, Pete, and Walker, the allotment interest-holders, respectfully pray that this Court issue a Writ of Certiorari to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit in *Elaine Christensen, et al. v. United*

States of America, et al., No. 84-1971 (March 12, 1985), (rehearing denied June 7, 1985).

———o———

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 755 F.2d 705 (9th Cir. 1985), and is printed as Appendix A to this petition. The opinion of the District Court is reported at 583 F. Supp. 1539 (D. Nev. 1984), and is printed as Appendix B. An earlier opinion of the District Court on a question not at issue in this proceeding is reported at 575 F. Supp. 735 (D. Nev. 1983). The order of the Ninth Circuit Court of Appeals denying the Petitioners' Petition for Rehearing is not reported, and is printed as Appendix C.

———o———

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1). The opinion of the Court of Appeals sought to be reviewed was issued on March 12, 1985. The allotment interest-holders filed a timely petition for rehearing. The Order of the Court of Appeals denying the petition for rehearing was issued June 7, 1985.

———o———

STATUTES INVOLVED

This case involves the interrelation of two Acts of Congress. The first of these, 28 U.S.C. § 2401(a), provides in pertinent part that

> every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The second, 25 U.S.C. §§ 345-346, provides in pertinent part that the

> district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. . . .

The full text of §§ 345-346, and the text of two relevant prior but now repealed statutes, 28 U.S.C. §§ 41(20) and (24) (1940 Ed.), is printed as Appendix D.

STATEMENT OF THE CASE

Petitioners hold undivided interests in an Indian allotment located in Douglas County, Nevada for which Katie Martinez, a Washoe Indian, filed an application in 1915, and which the United States conveyed in trust to Ms. Martinez in 1933. The allotment has continued to be and now is held in trust by the United States for the use and benefit of the allotment interest-holders. At the time the Martinez allotment was issued, and continuing until the

present, the allotment has been landlocked: The only feasible access to the allotment from a public road has been across privately owned land which was patented by the United States to a private individual in 1867, and which has continued in private ownership to the present. Access to the Martinez allotment was permitted across this privately owned land with the permission of the owners until the death of Katie Martinez in 1948 and the death of her spouse in 1951. Since 1951, access to the allotment has not been permitted across this privately owned land, and the allotment interest-holders have been able to obtain access to the Martinez allotment only on rare occasions.

Despite repeated requests by the allotment interest-holders since 1951, the Bureau of Indian Affairs, Department of the Interior, has not provided access to the Martinez allotment. In March, 1983, the allotment interest-holders filed an action in the District Court for the District of Nevada under 25 U.S.C. §§ 345-346, asserting that pursuant to the trust responsibility imposed upon the United States by 25 U.S.C. § 348, the United States had the obligation to provide the interest-holders access to the allotment, and was liable in money damages for past failures to provide such access. The allotment interest-holders sought to compel the United States to fulfill its obligation to assure them the use and benefit of the allotment, by purchasing or by condemning under state law a right-of-way affording access to the allotment. This would have involved either obtaining an easement to use an existing dirt road to the allotment, or the condemnation of an easement across approximately fifty to one hundred feet of privately owned land and the construction of a short dirt road across federally owned land.

The United States first filed a motion for judgment on the pleadings asserting that, as a matter of law, the United States had no obligation to provide access to the allotment. The District Court denied this motion, finding that while the United States was not liable in money damages for past deprivation of access to the Martinez allotment, prospective relief ordering the United States to provide access "is not beyond the reach of the Plaintiffs' complaint, as a matter of law." *Christensen v. United States,* 575 F. Supp. 735, 738 (D. Nev. 1983).

The United States also filed a motion for summary judgment, asserting that the allotment interest-holders had failed to state a claim upon which relief could be granted, and that their claims were barred by the six year statute of limitations for actions against the United States, 28 U.S.C. § 2401(a). The District Court granted summary judgment in favor of the United States, concluding that 28 U.S.C. § 2401(a) barred the allotment interest-holders' claims. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

In concluding that the statute of limitations of 28 U.S.C. § 2401(a) applied to a claim relating to an Indian allotment brought pursuant to 25 U.S.C. §§ 345-346, the Court of Appeals erroneously interpreted the derivation and legislative history of 28 U.S.C. § 2401(a), and reached a conclusion which is in conflict with decisions of the Eighth and Tenth Circuit Courts of Appeals. This case affords this Court the opportunity to restore conformity

to the decisions of the circuit courts of appeals, and to definitively resolve this important issue of whether any statute of limitations operates to terminate the United States' responsibility to the holders of interests in Indian allotments.

I. The Decision Below Directly Conflicts With Decisions Of The Eighth Circuit Court Of Appeals.

The Eighth Circuit Court of Appeals has held that actions relating to rights in Indian allotments brought pursuant to §§ 345-346 are not subject to the limitation period established by § 2401(a). In *Mottaz v. United States,* 753 F.2d 71 (8th Cir. 1985), the Eighth Circuit Court concluded that § 2401(a) does not bar §§ 345-346 actions for the federal government's wrongful taking of an Indian allotment. *Id.* at 74-75. In so holding, the court reiterated its position in *Antoine v. United States,* 710 F.2d 477 (8th Cir. 1983), in which an action against the United States for the loss of an Indian allotment was sustained, although the cause of action had accrued almost 100 years before the proceeding was commenced by the great-grandson and heir of the original allottee. *Id.* at 478.

The Tenth Circuit Court of Appeals also appears to consider that the limitation of § 2401(a) does not bar actions properly brought pursuant to §§ 345-346. *Vincenti v. United States,* 470 F.2d 845, 847 (10th Cir. 1972), *cert. dismissed,* 414 U.S. 1057 (1973); *See also, Begay v. Albers,* 721 F.2d 1274, 1277-79 (10th Cir. 1983).

In the view of both the Eighth and Tenth Circuit Courts of Appeals, § 2401(a) does not apply to actions re-

lating to Indian allotments brought pursuant to 25 U.S.C. §§ 345-346, such as that initiated by the allotment interest-holders in this case. The position of the Ninth Circuit Court in this case is directly contrary.[1] It is therefore appropriate for this Court to resolve this clear conflict among the circuit courts of appeals.

II. The Court Below Disregarded The Derivation And Legislative History Of 28 U.S.C. § 2401(a) Which Demonstrate That This Statute Is Not Applicable To Actions Brought Pursuant To 25 U.S.C. §§ 345-346.

The derivation and legislative history of 28 U.S.C. § 2401(a) make it clear that § 2401(a) has no application to actions relating to Indian allotments brought pursuant to 25 U.S.C. §§ 345-346. Section 2401(a) was derived from § 41(20) of Title 28 of the 1940 United States Code, *see*, H.R. Rep. No. 308, 80th Cong., 1st Sess., Appendix-Reviser's Notes, at A 185 (1947) (Hereinafter Rep. No. 308);[2] section 41(20) afforded original jurisdiction in the

---

1 The Ninth Circuit Court's articulated position is a recent one; in *Sampson v. United States*, 533 F.2d 499 (9th Cir. 1976), the court, discussing laches but not a statute of limitations, concluded that it had jurisdiction under 25 U.S.C. § 345 to review the administrative denial of an Indian allotment application some 40 years after the denial. *Id.* at 500-501.

2 The Report of the House of Representatives Committee on the Judiciary which accompanied H.R. 3214, 80th Cong., 1st Sess. (1947), the bill which was eventually enacted as the 1948 Judicial Code, analyzed the source and derivation of each section of the proposed Judicial Code, and in "Reviser's Notes" detailed all differences between each proposed Code section and its predecessor or source section. H.R. Rep. No. 308, *supra*, Appendix-Reviser's Notes, A1. The Report states that "[t]he reviser's notes are keyed to sections of the revision and explain in detail *every change* made in text." *Id.*, at pg. 7, (emphasis added).

Federal district courts for enumerated actions, and established a six-year statute of limitations for those actions. *See,* 28 U.S.C. § 41(20) (1940 Ed.). However, § 41(20) had no relevance to actions by Indians concerning their rights in allotments, because the district courts were given jurisdiction over those actions by §§ 345-346 and by an entirely separate provision of the 1940 and earlier Judicial Codes, § 41(24).[3] No statute of limitations was imposed upon such actions by § 41(24), by §§ 345-346, or by any other statute. *See,* 25 U.S.C. §§ 345-346, 28 U.S.C. § 41(24) (1940 Ed.).

This history makes it clear that the applicability of § 2401(a) to actions brought pursuant to 25 U.S.C. §§ 345-346 must arise, if at all, solely because the 1948 recodification of Title 28 was intended to impose upon §§ 345-346 actions a limitation which had not previously existed. However, the recodification which produced the 1948 Judicial Code clearly had no such purpose.

In the 1948 Revision of the Judicial Code, § 41(20) was merely simplified by separating its jurisdictional and limitation provisions: the jurisdictional provisions were codified at 28 U.S.C. § 1346, and the limitation provisions were codified at 28 U.S.C. § 2401(a). The Reviser's Note to § 2401 explains that the section is "[b]ased on title 28, U.S.C., 1940 ed., §§ 41(20), 942 . . .," and further states that the "[s]ection consolidates provision in section 41 (20) of title 28, U.S.C., 1940 ed., as to time limitation for bringing actions against the United States *under section*

---

[3] See, F. Cohen, *Handbook of Federal Indian Law,* (1982 Ed.), at 313-316, and particularly at 314, n. 265, for a discussion of the history and inter-relation of these provisions.

1346(a) of this title, with section 942 of said title 28." Rep. No. 308, *supra,* at A185 (Emphasis added). Thus, the Reviser's Note itself is explicit, that the statute of limitations established by § 2401(a) is derived from § 41 (20) of the 1940 Code, and that it applies "for bringing actions against the United States *under section 1346(a)*", thus encompassing those actions which were enumerated in § 41(20). *See,* Reviser's Note to § 1346, *Id.* at A121. Conspicuously lacking is any reference whatsoever to actions against the United States pursuant to § 41(24) of the 1940 Code or § 1353 of H.R. 3214, the codification of that prior Code provision in H.R. 3214 and later in the 1948 Judicial Code as 28 U.S.C. § 1353. *See,* Reviser's Note to § 2401, *Id.,* at A185. Nor is there any reference to actions pursuant to 25 U.S.C. §§ 345-346. Indeed, the entire Reviser's Note to § 2401 speaks only of changes from the provisions of § 41(20); there is no reference whatsoever to any intended change affecting § 41(24). *Id.*

Similarly lacking in the Reviser's Notes to § 1353 is any indication that the codification of § 41(24) was intended to impose a statute of limitations upon actions brought pursuant to that section. Reviser's Notes to § 1353, *Id.* at A124. Clearly, then, the revisers of the 1948 Judicial Code, and Congress in its consideration of that revision, did not contemplate the imposition of a statute of limitations upon actions brought pursuant to § 1353 of H.R. 3214, where no such statute of limitations had existed under § 41(24), the 1940 Code provision from which that section was derived. A fortiori, no statute of limitations on actions pursuant to 25 U.S.C. §§ 345-346 was intended.

In enacting the 1948 Judicial Code, Congress adhered to the well-established rule of statutory construction that unless an intent to effect a change is clearly expressed, no change of law or policy can be presumed from revision and consolidation of statutes. *United States v. Ryder,* 110 U.S. 729, 739-40 (1884); *McDonald v. Hovey,* 110 U.S. 619, 629 (1884); *Anderson v. Pacific Coast S.S. Co.,* 225 U.S. 187, 199 (1912); *See,* Barron, *The Judicial Code,* 8 F.R.D. 439, 445-46 (1949) (Comments of Chief Reviser of the 1948 Judicial Code).

These principles of statutory construction and the comments of the Chief Reviser of the 1948 Judicial Code compel the conclusion that the sweeping change of law and policy which the court below concluded was effected by the enactment of the Judicial Code of 1948, the imposition of a six year statute of limitations upon actions brought pursuant to 25 U.S.C. §§ 345-346, simply did not occur; and that now, as was the case prior to the codification and consolidation of former § 41(20) in the 1948 Judicial Code, no statute of limitations exists for actions brought pursuant to 25 U.S.C. §§ 345-346.

Lending further support to this premise is the equally well-established principle that in order to change or modify the special rights afforded Indians by statutes such as §§ 345-346, there must be some clear expression of Congressional intent to do so, *Hemmer v. United States,* 204 F. 898, 906 (8th Cir. 1912), *aff'd.,* 241 U.S. 379 (1916); *See, Squire v. Capoeman,* 351 U.S. 1, 6-8 (1956); *Morton v. Mancari,* 417 U.S. 535, 550-51 (1974), Congressional intent which is clearly lacking in the legislative history of the 1948 Judicial Code. Equally compelling is the established premise that actions involving Indian trust lands

are not subject to laches and statutes of limitations. *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922); *See, Oneida County, N.Y. v. Oneida Indian Nation*, 105 S.Ct. 1245, 1255-57 (1985).

———o———

CONCLUSION

At issue in this case is the important question whether a statute of limitations applies to bar actions against the United States by Indian allottees relating to their Indian allotments held in trust by the United States. The Court of Appeals, in concluding that the statute of limitations of 28 U.S.C. § 2401(a) applies, disregarded the derivation and legislative history of § 2401(a), and adopted a position in conflict with that of the Eighth and Tenth Circuit Courts of Appeals.

By granting this petition for certiorari, and reviewing and reversing the judgment of the court below, this Court should resolve this straightforward but important question and restore conformity to the decisions of the circuit courts of appeals.

Respectfully submitted this 3rd day of September, 1985.

RICHARD E. OLSON, JR.

NEVADA INDIAN-RURAL LEGAL SERVICES

600 East William Street, Suite 301
Carson City, Nevada 89701
Telephone: (702) 885-5110

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1971
D.C. No. CV R-83-93

ELAINE CHRISTENSEN, ORVILLE BROWN,
DORAN PETE and GLADYS WALKER,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

OPINION

(Filed March 12, 1985)

Appeal from the United States District Court
For the District of Nevada

The Honorable Edward C. Reed, Jr., Presiding
Argued and Submitted February 12, 1985

Before: WALLACE, HUG, and SKOPIL, Circuit Judges.
HUG, Circuit Judge:

The appellants filed this action seeking monetary and injunctive relief against the United States based on the Bureau of Indian Affair's failure to provide the appellants access to an Indian land allotment. The district court entered summary judgment for the United States on the ground that the appellants' claims were barred by the applicable statute of limitations. *Christensen v. United States,* 583 F. Supp. 1539 (D. Nev. 1984). We affirm.

FACTS AND PROCEEDINGS BELOW

The appellants are four American Indians who claim an undivided interest in an Indian allotment originally

issued to Katie Martinez by trust patent in 1933. Since that time, the United States has held the property in trust. At the time of issuance, the allotment was surrounded by public and private fee land. Access to the Martinez allotment was attainable only through private land. Katie Martinez and her husband were granted a right-of-way across a parcel of private land, which right-of-way was revoked by the private land owners in 1951.

Since 1951, the appellants have made numerous requests to the Bureau of Indian Affairs to provide access to the allotment. The appellants were represented by counsel since 1972 but no access was obtained. Finally, in 1983, the appellants filed the present action seeking (1) a declaratory judgment that the United States has an obligation to provide access to the allotment; (2) a writ of mandamus requiring the United States to provide access; (3) a declaration that the United States is liable for damages caused by the years of deprivation of use of the property; and (4) an award of damages for the alleged deprivation.

In response to the Government's motion for summary judgment, the district court concluded that the appellants' action under 25 U.S.C. § 345 was time-barred by the six-year statute of limitations provided by 28 U.S.C. § 2401(a). The present appeal followed.

DISCUSSION

A. *Standard of Review*

In reviewing a grant of summary judgment, we decide whether there exists any material disputed fact and whether the substantive law was correctly applied. *Amaro*

v. Continental Can Co., 724 F.2d 747, 749 (9th Cir. 1984). The parties do not contest the fact that the appellants' cause of action accrued long before six years prior to the commencement of this action. Therefore, the sole question is whether the district court applied the appropriate statute of limitations, a question of law. *Aragon v. Federated Department Stores,* slip op. 83-6435 at 30 (9th Cir. Jan. 11, 1985); *Edwards v. Teamsters Local Union No. 36,* 719 F.2d 1036, 1039 (9th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 1599 (1984). Decisions of law are reviewed *de novo. United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 105 S. Ct. 101 (1984).

B. *Merits*

The appellants' claims are founded in 25 U.S.C. § 345, which gives federal courts jurisdiction to determine whether an allotee has been deprived of rights acquired through an Indian allotment. *Arenas v. United States,* 322 U.S. 419, 432 (1944). The court's power is not restricted to compelling the issuance of a patent, but extends to protect, preserve, or define an allotment once issued. *Scholder v. United States,* 428 F.2d 1123, 1126 (9th Cir.), *cert. denied,* 400 U.S. 942 (1970); *United States v. Pierce,* 235 F.2d 885, 888 (9th Cir. 1956).

Section 345 serves as a limited waiver of the Government's sovereign immunity. *Scholder,* 428 F.2d at 1126. We have held that 28 U.S.C. § 2401(a), which provides a six-year statute of limitations to "every civil action commenced against the United States," applies to actions brought under section 345. *Loring v. United States,* 610 F.2d 649, 650 (9th Cir. 1979).

The appellants claim that the application of section 2401(a) should be limited to impose time limitations only to the extent of its predecessor, 28 U.S.C. § 41(20), which provided a limitations period for Tucker Act claims. The Tucker Act was concerned only with claims for monetary relief, and the appellants argue that the subsequent enactment of section 2401(a) did not evince any congressional intent to extend its scope to equitable claims.

In *Werner v. United States*, 188 F.2d 266 (9th Cir. 1951), we addressed the issue raised by the appellants. In that case, the plaintiff brought a suit against the United States for reformation of a lease and damages. The cause of action accrued more than six years before the action had been filed. We observed that Title 28—within which section 2401(a) is enumerated—was not a mere codification of prior law, but also a revision. *Id.* at 268. We held that section 2401(a) unambiguously provides a general statute of limitations and that therefore "[t]he provisions of Section 2401(a) apply to a suit for reformation, originally an action in equity, precisely as they would to a suit for damages, an action at law." *Id. Accord, Walters v. Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983). The appellants' contention that section 2401(a) does not apply to actions in equity is without merit.

Reading *Loring* and *Werner* together, we cannot escape the conclusion that section 2401(a) applies to *all* actions brought under section 345, whether the relief requested is legal or equitable. The appellants argue, however, that because of the special trust relationship between the United States and American natives, laches and statutes of limitations are not generally invoked against Indians. There are cases in which courts have failed to

apply a statute of limitations to actions which would appear to have been untimely under section 2401(a). *See Sampson v. United States,* 533 F.2d 499 (9th Cir. 1976) (although section 345 action brought for a denial of a 1926 allotment application, court does not apply statute of limitations). However, speculation as to any *sub silentio* ruling in *Sampson* on the inapplicability of section 2401(a) to section 345 actions is rendered unnecessary by the explicit holdings in *Loring* and *Werner,* to which we are bound. *See Walters,* 725 F.2d at 112 n.12 (in determining whether section 2401(a) is applicable, "the observation that courts have not, in particular cases, addressed the issue of a possible time bar does not lead to the conclusion that no such problem existed, and certainly does not control the case at bar.").

We conclude that the appellants' equitable and legal claims under section 345 are time-barred by the six-year statute of limitations provided by section 2401(a). Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-R-83-93-ECR

ELAINE CHRISTENSEN, ORVILLE BROWN, DORAN PETE and GLADYS WALKER,
Plaintiffs,

UNITED STATES OF AMERICA and WILLIAM RUCKELSHAUS, United States Secretary of Interior,
Defendants.

MEMORANDUM DECISION
AND ORDER

(Filed April 27, 1984)

Defendant Ruckelshaus is hereby substituted, pursuant to Fed.R.Civ.P. 25(d), for James Watt, his predecessor in the office of Secretary of Interior.

The defendants have moved for summary judgment on the grounds that the action is barred by the applicable statute of limitations and that the complaint fails to state a claim upon which relief can be granted against them.

In 1933, the United States granted a trust allotment to Katie Martinez, a Washoe Indian. The granting document made no mention of rights-of-way or other access to the allotment. The most feasible access from the nearest public road requires the crossing of land that has been privately owned since 1867. The owners permitted Katie Martinez and her husband to cross their land until their deaths, which occurred in 1948 and 1951, respectively. Then the path they had been using was fenced off.

The plaintiffs herein, who are heirs of Katie Martinez, have made ongoing requests to the Bureau of Indian Affairs to provide access to the allotment. Since 1972 those requests have been made by attorneys for the plaintiffs. No access has been provided.

The complaint alleges that the United States has breached the duty imposed on it by 25 U.S.C. § 348 to hold the allotment in trust for the sole use and benefit of the Indian allottee. That duty encompasses the obligation to furnish unrestricted access, according to the plaintiffs. The prayer for relief asks for a declaratory judgment that the United States is obligated to provide unrestricted access, and for a writ in the nature of mandamus requiring the Secretary of Interior to take immediate action to implement the same.

The defendants argue that § 348 does not impose a trust obligation to provide access to the allottment, therefore a claim for relief has not been stated. Also, they point out that 28 U.S.C. § 2401(a) states that ". . . every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The complaint herein was not filed until 1983. The right of access was revoked in 1951.

The plaintiffs emphasize that Congress' intent in enacting the General Allotment Act was to make the Indian allottees secure in their possession so that they would actually use and benefit from the allotments. This cannot be accomplished without access. Therefore, it is urged, equitable relief should be granted even if damages are precluded. As to the statute of limitations defense, the

plaintiffs insist that 28 U.S.C. § 2401(a) is not applicable to an action brought under 25 U.S.C. § 345. The latter statute authorizes any Indian who has been excluded from his allotment to bring an action in a proper United States District Court. The legislative history of § 2401(a) is cited for the proposition that Indian claims are meant to be treated differently than other civil claims against the United States. Prior to 1948 legislation they were treated uniquely; the plaintiffs contend that the legislation does not reflect an intent to change this preferential treatment of the Government's Indian wards. No general statute of limitation is meant to bar an Indian's suit against the United States for breach of trust, they assert.

Contrary to the plaintiffs' position, it has been held that 28 U.S.C. § 2401(a) is more than a mere codification of prior law—it is also a revision. *Werner v. United States,* 188 F.2d 266, 268 (9th Cir. 1951). Furthermore, it is jurisdictional. *Loring v. United States,* 610 F.2d 649, 650 (9th Cir. 1979). *Loring* was an action brought under 25 U.S.C. § 345, as is the instant litigation. § 2401(a) applies to equitable claims against the Government as much as to damages claims. *Nichols v. Hughes,* 721 F.2d 657, 659 (9th Cir. 1983); *Werner v. United States, supra* at 268.

There have been cases that have held that where a fiduciary relationship exists between the parties, a statute of limitations doesn't begin to run until the relationship is repudiated. *See Manchester Band of Pomo Indians, Inc. v. United States,* 363 F.Supp. 1238, 1249 (N.D. Cal. 1973). Those cases have been distinguished, however, on the ground that they all involved liquidated claims whose validity was uncontested and for which money had been

appropriated. *Capoeman v. United States,* 440 F.2d 1002, 1003 (Ct.Cl. 1971). In any event, the defendants herein repudiated any fiduciary obligation as to providing access to the allotment more than six years prior to the commencement of this action.

Where the Government has consented to be sued, any limitation period established by Congress must be strictly observed; exceptions are not to be implied. *Mann v. United States,* 399 F.2d 672, 673 (9th Cir. 1968). Accordingly, the fact that a plaintiff is an Indian who may be more dependent on the Government than most people does not create an exception to the applicable statute of limitations. *Ibid.; Capoeman v. United States, supra* at 1007-8; *Hydaburg Co-op Ass'n v. United States,* 667 F.2d 64, 69-70 (Ct. Cl. 1981).

In federal court, a cause of action accrues when an injury is discovered. *Nichols v. Hughes, supra* at 659. The fencing off of the access path and the revocation of permission to use it occurred in 1951 or very shortly thereafter. The plaintiffs admittedly were aware of the changes and their effect on the allotment. Their action against the defendants is time-barred by 28 U.S.C. § 2401(a). That being the case, the issue of whether the defendants have breached a duty to the plaintiffs need not be decided here.

The Court can sympathize with the plaintiffs' feelings that they have been wronged. There may well be a moral obligation on the part of the Government to attempt to rectify the situation. Nevertheless, such an obligation, if it exists, cannot be enforced in this lawsuit.

A statute of limitations defense is properly asserted by a motion for summary judgment. *Admiralty Fund v.*

Jones, 677 F.2d 1289, 1293 (9th Cir. 1982). If the action is clearly barred, the defendants are entitled to judgment as a matter of law. *Ibid.* Such is the case here, where no factual issues need be adjudicated to determine whether the statute has run.

IT IS, THEREFORE, HEREBY ORDERED that the plaintiffs complaint be DISMISSED.

DATED: April 23, 1984.

/s/ Edward C. Reed,
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1971
D.C. No. CV R-83-93

ELAINE CHRISTENSEN, ORVILLE BROWN, DORAN PETE and GLADYS WALKER,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ORDER

(Filed June 7, 1985)

Appeal from the United States District Court
for the District of Nevada

Before: WALLACE, HUG, and SKOPIL, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

25 U.S.C. §§ 345-346

§ 345. Actions for allotments.

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

§ 346. Proceedings in actions for allotments

The plaintiff shall cause a copy of his petition filed under section 345 of this title, to be served upon the United States attorney in the district wherein suit is brought, and shall mail a copy of same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the United States attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided,* That should the United States attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

28 U.S.C. § 41 (20) (1940 Ed.)

(20) Suits against United States.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or

upon any regulation of an exectuive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. Nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the Civil War, and commonly known as "war claims", or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March 1887 by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such pur-

pose by persons claiming as such officers, or as assignees or legal representatives thereof; but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

28 U.S.C. § 41 (24) (1940 Ed.)

(24) Suits concerning allotments of land to Indians; decrees; appeal.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency. The right of appeal shall be allowed to either party as in other cases.

FILE COPY

No. 85-372

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

ELAINE CHRISTENSEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Boruski v. *United States*, 493 F.2d 301, cert. denied, 419 U.S. 808 4

Geyen v. *Marsh*, No. 84-4607 (5th Cir. Nov. 5, 1985) 4

Impro Products, Inc. v. *Block*, 722 F.2d 845, cert. denied, No. 84-170 (Oct. 29, 1984) 4

Loring v. *United States*, 610 F.2d 649 3

Mottaz v. *United States*, 753 F.2d 71, petition for cert. pending, No. 85-546 ... 3, 4, 5, 6

Screven v. *United States*, 207 F.2d 740 4

Walters v. *Secretary of Defense*, 725 F.2d 107 ..... 3, 4

Werner v. *United States*, 188 F.2d 266 ..... 3, 4

Statutes:

25 U.S.C. 345 ..... 2, 3

25 U.S.C. 348 2

28 U.S.C. (1946 ed.) 41(20) 3

28 U.S.C. (1946 ed.) 41(24) 3, 4

28 U.S.C. 2401(a) 1, 2, 3, 4, 5

28 U.S.C. 2501 5

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-372

ELAINE CHRISTENSEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioners are the heirs of an Indian allottee and now own interests in her allotment. Petitioners contend that the court of appeals erred in holding that this action, in which they seek an order compelling the United States to condemn or purchase an easement to provide access to the allotment, is barred by the six-year statute of limitations in 28 U.S.C. 2401(a).

1. a. Petitioners are the heirs of Katie Martinez, a Washoe Indian, who was granted an allotment in 1933. The allotment has been held in trust by the United States since that time. The most feasible means of access to the allotment is across land that has been privately owned since 1867, and the owners of that land permitted Martinez and her husband to cross it until their deaths in 1948 and 1951, respectively. The owners denied further access at that time. Petitioners subsequently requested the Bureau of Indian

Affairs (BIA) to provide access to the allotment, and after 1972, they were represented by counsel in that endeavor. Pet. App. 1-2, 6-7.

b. In 1983, petitioners filed this action against the United States and the Secretary of the Interior in the United States District Court for the District of Nevada. Petitioners alleged that the United States has an obligation under 25 U.S.C. 348 to furnish unrestricted access to the allotment. They sought a declaratory judgment to that effect; a writ in the nature of mandamus requiring the Secretary of the Interior to purchase or condemn under state law a right-of-way across private land that would give them access to the allotment; and damages for the deprivation of the use of the property in the past. Petitioners asserted a right of action under 25 U.S.C. 345, which provides that any persons of Indian descent who claim to be entitled to an allotment may commence an action against the United States in the proper district court of the United States. Pet. 4; Pet. App. 2, 7-8.

The district court granted the government's motion to dismiss the complaint. Pet. App. 6-10. It held that the suit is barred by the statute of limitations in 28 U.S.C. 2401(a), which provides (with one exception not relevant here) that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." In the district court's view, petitioner's right of action accrued in 1951, when the privilege of access that had been exercised by Martinez and her husband was revoked, because petitioners admittedly were aware at that time of the effect of those changed circumstances on the allotment. Accordingly, the court held that this suit—which was filed in 1983, far more than six years after the cause of action first accrued—is barred by 28 U.S.C. 2401(a). Pet. App. 9-10.

c. The court of appeals affirmed. Pet. App. 1-5. Following its prior decision in *Loring* v. *United States,* 610 F.2d 649, 650 (9th Cir. 1979), the court of appeals held that the statute of limitations in 28 U.S.C. 2401(a) applies to actions brought by Indians against the United States under 25 U.S.C. 345. Pet. App. 3. The court of appeals also rejected petitioners' contention that 28 U.S.C. 2401(a) applies only to suits for money damages under the Tucker Act and therefore does not bar equitable relief. The court acknowledged that a six-year statute of limitations had been contained in 28 U.S.C. (1946 ed.) 41(20) (the Tucker Act provision applicable to district courts) and not in 28 U.S.C. (1946 ed.) 41(24) (which conferred jurisdiction on the district courts over suits for allotments). The court held, however, that the 1948 revision of Title 28 made the six-year limitations period in 28 U.S.C. 2401(a) applicable to "every civil action" against the United States, including actions under 25 U.S.C. 345 for equitable relief. See Pet. App. 4, citing *Walters* v. *Secretary of Defense,* 725 F.2d 107, 113 (D.C. Cir. 1983), and *Werner* v. *United States,* 188 F.2d 266, 268 (9th Cir. 1951). Finally, the court concluded that petitioners' argument that the limtations period in 25 U.S.C. 2401(a) should not be invoked against Indians because of the special trust relationship between the United States and Indians was foreclosed by the Ninth Circuit's prior decisions in *Loring* v. *United States, supra,* and *Werner* v. *United States, supra.* Pet. App. 4-5.

2. This case presents a question concerning the application of the statute of limitations in 28 U.S.C. 2401(a) to actions brought by Indians against the United States. Somewhat related questions are presented in *United States* v. *Mottaz*, petition for cert. pending, No. 85-546, and we therefore suggest that the petition in this case be held and disposed of in light of the Court's disposition in *Mottaz.*

In our view, *Mottaz* presents a more suitable vehicle than does this case for the Court's consideration of the application of federal statutes of limitations to such suits. The only argument petitioners advance for avoiding the statute of limitations in 25 U.S.C. 2401(a) is based on the 1948 revision of Title 28 of the United States Code. See Pet. i, 7-11. They point out that prior to 1948, the paragraph that conferred Tucker Act jurisdiction on the federal district courts had contained a six-year statute of limitations (see 28 U.S.C. (1946 ed.) 41(24)), but the paragraph that conferred jurisdiction over actions involving a right to allotments had not (see 28 U.S.C. (1946 ed.) 41(24)). Petitioners argue that 28 U.S.C. 2401(a) therefore should also be limited to suits under the Tucker Act.

The Eighth Circuit in *Mottaz* did not accept the argument that 28 U.S.C. 2401(a) applies only to suits for money damages under the Tucker Act, and that argument has been rejected by all the courts of appeals that have considered it. *Geyen* v. *Marsh*, No. 84-4607 (5th Cir. Nov. 5, 1985), slip op. 472-473; *Walters* v. *Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983), quoting *Werner* v. *United States*, 188 F.2d 266, 268 (9th Cir. 1951). See also *Impro Products, Inc.* v. *Block*, 722 F.2d 845, 850 n.8 (D.C. Cir. 1983), cert. denied, No. 84-170 (Oct. 29, 1984); *Boruski* v. *United States*, 493 F.2d 301, 304 n.5 (2d Cir.), cert. denied, 419 U.S. 808 (1974); *Screven* v. *United States*, 207 F.2d 740, 741 (5th Cir. 1953). This uniform view of the courts of appeals is correct. By its terms, 28 U.S.C. 2401(a) applies to "every civil action commenced against the United States" (with the exception of suits under the Contract Disputes Act of 1978), while the six-year limitations period in 28 U.S.C. (1946 ed.) 41(24) expressly applied only to suits "under this paragraph"—*i.e.*, under paragraph 41(24), which conferred Tucker Act jurisdiction on the district courts. Because there is no conflict among the circuits with respect to this issue regarding the effect of the 1948 revision of Title 28, and

because this is the only issue petitioners present for review (Pet. i, 7-11), plenary review is not warranted in this case.

In *Mottaz,* by contrast, the Eighth Circuit held that the generally applicable statute of limitations in 28 U.S.C. 2401(a) is inapplicable to a claim by an Indian based on an allegedly void transaction, in light of what the court believed to be special considerations deriving from the protection afforded Indian lands. *Mottaz* v. *United States,* 753 F.2d 71, 73 (8th Cir. 1985). As we explain in the petition in *Mottaz* (at 16-17),* that holding conflicts with the consistent holdings of the Court of Claims and Federal Circuit that the parallel statute of limitations in 28 U.S.C. 2501 applies to suits by Indians in the same manner as it applies to suits by other claimants, notwithstanding the existence of a fiduciary relationship. *Mottaz* also involves issues concerning the proper basis of jurisdiction over suits by Indians against the United States to resolve disputed questions of title or to recover money damages for actions concerning the administration and sale of allotments. These questions are of broad importance and warrant review by this Court, but they would not be resolved if the Court granted review in this case but not in *Mottaz.* By the same token, the respondent in *Mottaz* has presented in support of the Eighth Circuits' judgment in that case the same argument petitioners advance in this case concerning the 1948 revision of Title 28. See 85-546 Br. in Opp. 16-19. There accordingly would be no reason to grant review here as well even if the question petitioners present independently warranted review by this Court.

---

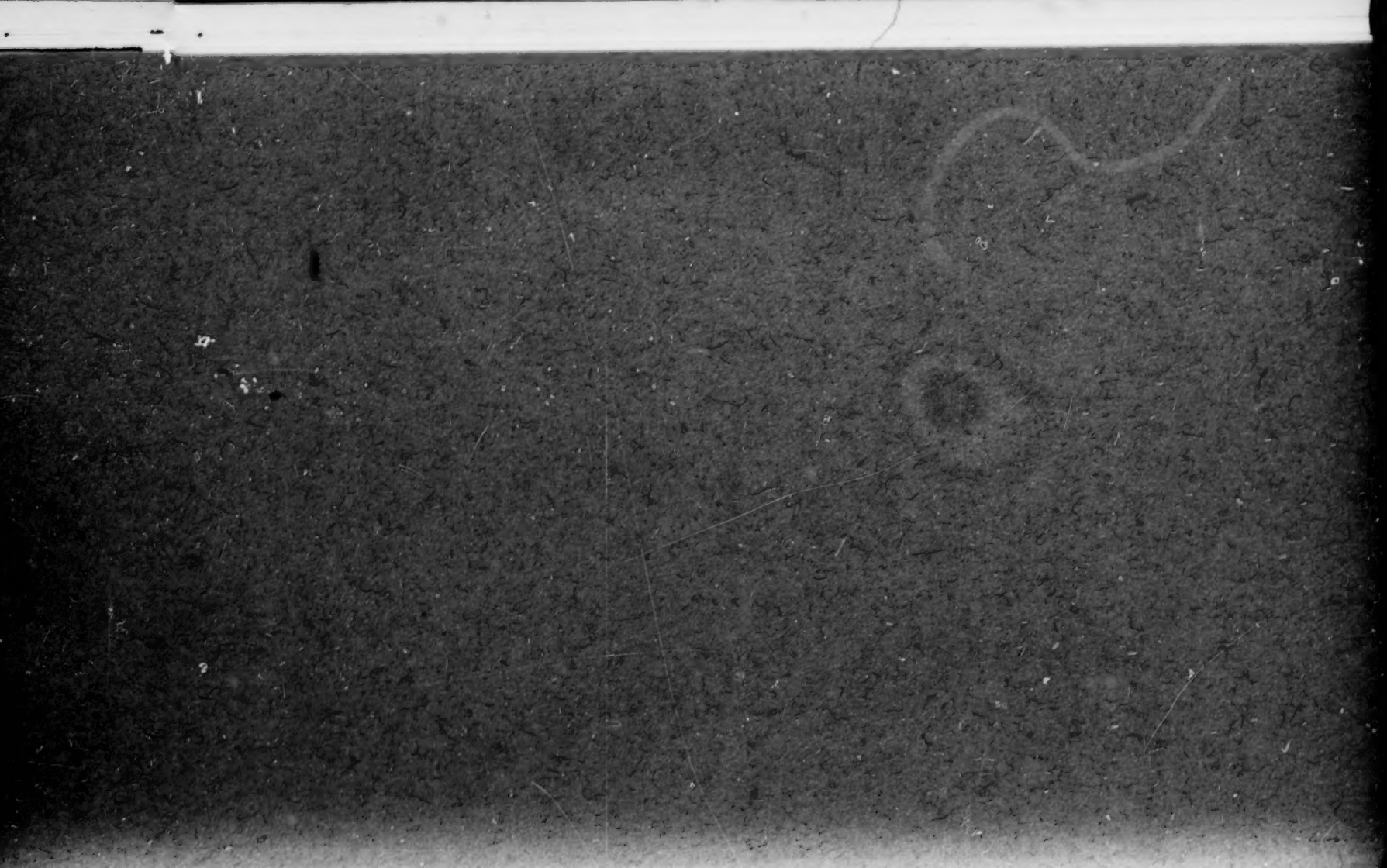
*We have furnished counsel for petitioners with copies of our certiorari petition and reply brief in *Mottaz.*

It is therefore respectfully submitted that the petition in this case should be held and disposed of in light of the Court's disposition in *United States* v. *Mottaz*, petition for cert. pending, No. 85-546.

CHARLES FRIED
Solicitor General

NOVEMBER 1985

DOJ-1985-11



Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-372

In The
Supreme Court of the United States
October Term, 1985

———o———

ELAINE CHRISTENSEN, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

———o———

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

———o———

PETITIONERS' REPLY TO MEMORANDUM FOR THE RESPONDENTS

———o———

RICHARD E. OLSON, JR.
NEVADA INDIAN-RURAL LEGAL SERVICES
600 East William Street, Suite 301
Carson City, Nevada 89701
Telephone: (702) 885-5110

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Authorities

Cases Cited — Page

Mottaz v. United States, 753 F.2d 71, *cert. granted*, — U.S.L.W. — (U.S. Nov. 18, 1985) (No. 85-546) 2, 3, 4

Statutes Cited

25 U.S.C. § 345 ..... 1, 4

28 U.S.C. § 2401(a) 2, 3

Rule 37.3 ..... 2, 3, 4

No. 85-372

In The

Supreme Court of the United States

October Term, 1985

ELAINE CHRISTENSEN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO MEMORANDUM FOR THE RESPONDENTS

The Petitioners, holders of an interest in a land-locked Indian trust allotment, brought an action in the U.S. District Court for the District of Nevada pursuant to 25 U.S.C. § 345 to compel the United States to provide access

to the allotment. The District Court dismissed the action, on the basis that it was barred by the six-year statute of limitations for actions against the United States found in 28 U.S.C. § 2401(a). The Ninth Circuit Court of Appeals affirmed this determination, and the Petitioners filed this Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals, No. 85-372, to obtain review of this determination. The specific question presented in the Petition was:

> Did the codification in the 1948 Judicial Code of the six-year statute of limitations for certain actions against the United States formerly found in a subsection of the 1940 Judicial Code extend that statute of limitations to actions relating to Indian allotments, which were not subject to any statute of limitations prior to the adoption of the Judicial Code of 1948?

Pet. i.

Instead of opposing the Petition, the United States has "suggest[ed] that the petition in this case be held and disposed of in light of the Court's disposition in *Mottaz.*" Memorandum for the Respondents 3. The United States' reference was to *United States v. Mottaz, et al.*, No. 85-546, in which this Court granted the United States' Petition for Certiorari on November 18, 1985.

The Petitioners respectfully suggest that the question presented in this case is not, as the United States characterizes it, merely "somewhat related" to that presented in *United States v. Mottaz*, No. 85-546. Memorandum for the Respondents 3. Rather, it is virtually identical. Therefore, the Petition in this case should be granted, and this case and No. 85-546 should be briefed and argued together as one case, in accord with Rule 37.3.

In *United States v. Mottaz*, No. 85-546, the United States posed the question presented as

> Whether either the six-year statute of limitations in 28 U.S.C. 2401(a) or the twelve-year statute of limitations under the Quiet Title Act, 28 U.S.C. 2409a(f), bars a suit brought by the heir of an Indian allottee against the United States to recover land (or its value in money damages) to which the United States acquired title twenty-seven years earlier.

No. 85-546, Pet. (I).

The thrust of the questions presented in this case and in *Mottaz* thus are identical: Whether the six-year statute of limitations of 28 U.S.C. § 2401(a) applies to an action relating to an Indian allotment. The United States recognized this identity in its Petition for Writ of Certiorari in *United States v. Mottaz*, No. 85-546, where it was asserted that

> In contrast to the Eighth Circuit's decision in this case, the Ninth Circuit has held that a suit by an Indian under 28 U.S.C. 345 is subject to the generally applicable statute of limitations in 28 U.S.C. 2401(a). *Christensen v. United States*, 755 F.2d 705 (9th Cir. 1985). Accord, *Big Spring v. United States*, No. 84-4170 (9th Cir. July 31, 1985); *Loring v. United States*, 610 F.2d 649 (9th Cir. 1979). Indeed, the plaintiff in *Christensen* has filed a petition for a writ of certiorari asserting that the Eighth Circuit's decision in this case conflicts with the Ninth Circuit's holding in *Christensen*. See 85-372 Pet. 6.

No. 85-546 Pet. 23.

Thus, there exists here precisely the situation contemplated by Rule 37.3, which provides that "[o]n the Court's own motion, or on motion of one or more parties, the Court may order that two or more cases, involving what appear

to be the same or related questions, be argued together as one case, or on such terms as may be prescribed." Rule 37.3.

The Petitioners therefore respectfully request that this case, *Christensen v. United States*, No. 85-372, be briefed and argued together with *United States v. Mottaz*, No. 85-546. By so ordering, this Court will achieve the full and expeditious resolution of the important question of whether statutes of limitations for actions against the United States are applicable to cases involving Indian trust allotments brought pursuant to 25 U.S.C. § 345.

Respectfully submitted this 22nd day of November, 1985.

RICHARD E. OLSON, JR.
NEVADA INDIAN-RURAL LEGAL SERVICES
600 East William Street, Suite 301
Carson City, Nevada 89701
Telephone: (702) 885-5110

Attorneys for Petitioners

Supreme Court, U.S.
FILED
OCT 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-372

In The
Supreme Court of the United States
October Term, 1985

ELAINE CHRISTENSEN, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE

Richard B. Brown, Esq.
Faulkner, Banfield,
Doogan & Holmes
2550 Denali Street, Suite 700
Anchorage, Alaska 99503
Telephone: (907) 274-0666

Allan E. Tesche, Esq. *
Faulkner, Banfield,
Doogan, & Holmes
2550 Denali Street, Suite 700
Anchorage, Alaska 99503
Telephone: (907) 274-0666

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

TABLE OF CONTENTS

SUBJECT INDEX

	Page
TABLE OF AUTHORITIES	ii
I. INTEREST OF AMICUS	1
II. THIS COURT HAS PREVIOUSLY RECOGNIZED THAT THE ADOPTION OF THE 1948 REVISIONS TO THE JUDICIAL CODE WERE NOT INTENDED TO BRING ABOUT A WHOLESALE CHANGE IN SUBSTANTIVE RIGHTS	4
III. ACTIONS INVOLVING THE TRUST RESPONSIBILITY OF THE UNITED STATES TO INDIANS ARE NOT SUBJECT TO LIMITATIONS PERIODS	5
IV. CONCLUSION	7
APPENDIX A	a-1
APPENDIX B	a-5

TABLE OF AUTHORITIES

Page

CASES

Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957) 5

Manchester Band of Pomo Indians v. United States, 363 F.Supp. 1238 (N.D. Calif. 1973) 6

Muniz v. Hoffman, 422 U.S. 454 (1975) 5

Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976) 2

Smith v. McCullough, 270 U.S. 456 (1926) 4

United States v. Mitchell, 462 U.S. 206 (1983) 5

STATUTES

25 U.S.C. § 345 ..... 2, 4, 5

28 U.S.C. § 2401(a) 2, 4, 6

34 Stat. 197 ..... 2, 3

No. 85-372

In The

Supreme Court of the United States

October Term, 1985

ELAINE CHRISTENSEN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE

I

INTEREST OF AMICUS

This brief is filed in support of petition for certiorari, the written consent of all parties having been granted. The amici urge that the court grant the petition, for the

difficulties created by the conflict between the Ninth and Eighth Circuit Courts of Appeal have not been suffered only by the petitioners. They extend to other allotment claimants who have been deprived of substantial rights due to overreaching conduct by the government.

Ms. Kendall and Mr. St. Clair are parties to litigation pending before the United States District Court for the District of Alaska which involves precisely the same legal issues presented in the petition for certiorari. Their complaint, which was filed in their capacities as the heirs of their late father, claims relief under 25 U.S.C. § 345 and seeks a judicial declaration that a conveyance of their father's Indian allotment was solicited and coerced by the government in violation of the provisions of the Alaska Native Allotment Act of 1906, 34 Stat. 197. Allotment claims asserted under the provisions of that Act are within the purview of 25 U.S.C. § 345. *See, Pence v. Kleppe,* 529 F.2d 135, 138-139 (9th Cir. 1976).

The government has filed a motion to dismiss the complaint of the proposed amici. Its motion asserts that the limitations in 28 U.S.C. § 2401(a) are applicable to actions brought under 25 U.S.C. § 345. The motion to dismiss has been fully briefed, but further proceedings before the District Court have been stayed pending a final disposition of the case at bar. *See,* Appendix A.

Shirley Kendall and Kelly St. Clair are Tlingit Indians whose family has long resided in Hoonah, a small community located on Chichagof Island in southeastern Alaska. As noted in the motion, they have filed suit in their capacities as the heirs of the late Frank St. Clair seeking to recover a 9.4 acre allotment of land located

north of Hoonah in Glacier Bay National Monument. They claim relief under 25 U.S.C. § 345. The factual basis for the claim of the amici is described in the complaint attached to this brief as Appendix B.

Frank St. Clair's original application for an allotment was submitted on April 15, 1915 pursuant to the Alaska Native Allotment Act of 1906, 34 Stat. 197. His application sought 160 acres of land located to the north of Hoonah, in what is now Glacier Bay National Monument. It is not disputed that on October 24, 1930, the United States Department of the Interior approved the application and granted Mr. St. Clair a 9.4 acre parcel subsequently designated as U. S. Survey 1954. It is also undisputed that in 1941 the United States executed a certificate of allotment stating that the parcel "shall be deemed to be the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress".

In 1955, Mr. St. Clair executed a deed to his allotment naming the United States as grantee. His heirs allege that he executed the deed only because the conveyance was coerced by employees of the National Park Service who repeatedly told him that it was unlawful to hold title to land in Glacier Bay National Monument and threatened to have the land taken from him without compensation. These representations, though manifestly untrue, frightened Mr. St. Clair into agreeing to sell the land for $891.00. He never received a penny of the purchase price from the government, however, due to the fact that the Bureau of Indian Affairs remitted the money to the federal Public Housing Administration to satisfy a

debt which the latter agency was making no effort to collect and which was ultimately forgiven.

If given an opportunity to litigate their claims on the merits the amici will prove the facts outlined above and demonstrate that the government breached its fiduciary duties to themselves and their father. They will also establish that the conveyance was made in violation of a provision of the 1906 Act expressly stating that allotted lands were inalienable.[1] These legal deficiencies render Frank St. Clair's conveyance void *ab initio*. *See, Smith v. McCullough,* 270 U.S. 456 (1926) (lease negotiated for term inconsistent with allotment act's restriction on alienation held void). The amici have substantial claims to assert and are seeking to remedy a serious injustice. If the government is permitted to assert the limitations in 28 U.S.C. § 2401(a) as a bar to relief under 25 U.S.C. § 345 they will lose the opportunity to have their claims heard on the merits.

II

THIS COURT HAS PREVIOUSLY RECOGNIZED THAT THE ADOPTION OF THE 1948 REVISIONS TO THE JUDICIAL CODE WERE NOT INTENDED TO BRING ABOUT A WHOLESALE CHANGE IN SUBSTANTIVE RIGHTS

The petitioners have presented a discussion of the roots of 28 U.S.C. § 2401(a) which persuasively demonstrates that the statute's origins in the 1948 Judicial Code were not intended to impact actions relating to Indian allotments filed pursuant to 25 U.S.C. § 345. Their argu-

---

[1] The relevant text of the 1906 Act is quoted in paragraph 20 of Appendix A.

ment is further buttressed by decisions of this court, which has observed that every change in the text of the Code is explained in detail in the Revisor's Notes and has further recognized that:

> Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed.

Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227 (1957). *Accord, Muniz v. Hoffman*, 422 U.S. 454, 472 (1975). ["A change in the language of a statute itself was not enough to effect a substantive change for 'every change made in the text is explained in detail in the Revisor's Notes' . . . and the notes fail to express any substantive change (citations omitted).] As petitioners have noted, nothing in the Revisor's Notes indicates that the 1948 Code was intended to expand the bar of the six year statute of limitations to cover claims based on allotment legislation.

III

ACTIONS INVOLVING THE TRUST RESPONSIBILITY OF THE UNITED STATES TO INDIANS ARE NOT SUBJECT TO LIMITATIONS PERIODS

It is beyond question that allotment legislation creates a trust relationship between the government and allotment claimants with reference to the administration of allotment programs. *See, United States v. Mitchell*, 462 U.S. 206 (1983). Though there are limits on the scope of the government's trust duties concerning allotments, clear-

ly misrepresentations and threats directed at allottees in an effort to obtian a relinquishment of statutorily inalienable land constitutes a breach of fiduciary duty.

Application of 28 U.S.C. § 2401(a) to claims such as those asserted by petitioners and the amici ignores the well-established doctrine that statutes of limitation do not apply to bar suits by beneficiaries against their trustees for breach of fiduciary duty. This rule was applied in the Indian law context by *Manchester Band of Pomo Indians v. United States,* 363 F.Supp. 1238 (N.D. Calif. 1973), where the court ruled specifically on the applicability of § 2401(a) in an action by a tribal group to recover damages for a failure by the government to manage trust funds properly. The court stated:

> [W]here as here, there is a fiduciary duty between the parties, the universal rule is that "a statute of limita tions does not begin to run where there is a fiduciary relationship between the parties until the relationship is repudiated." . . .
>
> Thus, the statute does not run against the beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship terminated.
>
> * * *
>
> [T]he reason for such a rule "concentrates on the necessity of dealing fairly with a group of people still placed under a disability of dependency and to which a greater obligation is owed than a narrowly legalistic view of what constitutes a technical 'duty'."

Id., at 1249. Under such circumstances, it would violate public policy to interpret 28 U.S.C. § 2401(a) as barring the claims of petitioners and Shirley Kendall and Kelly St. Clair.

IV

CONCLUSION

For the reasons set forth above and in the petition for certiorari the writ sought by petitioners should be granted.

Respectfully submitted this 1st day of October, 1985.

Richard B. Brown, Esq.
Faulkner, Banfield,
Doogan & Holmes
2550 Denali Street, Suite 700
Anchorage, Alaska 99503
Telephone: (907) 274-0666

Allan E. Tesche, Esq. *
Faulkner, Banfield,
Doogan, & Holmes
2550 Denali Street, Suite 700
Anchorage, Alaska 99503
Telephone: (907) 274-0666

* Counsel of Record

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SHIRLEY KENALL and KELLY ST. CLAIR,
Heirs of Frank St. Clair,

Plaintiffs,

vs.

WILLIAM P. CLARK, Secretary of the U. S.
Department Of Interior and the

UNITED STATES OF AMERICA,

Defendants,

Case No.: A83-593 Civil

STIPULATION FOR EXTENSION OF STAY

(Filed August 5, 1985) .

WHEREAS, on April 8, 1985, the court approved a stay of further proceedings in the above entitled matter pending the determination on the petition for rehearing and rehearing *en banc* filed with the U. S. Court of Appeals for the Ninth Circuit by the plaintiff-appellants in *Christensen, et al. v. United States of America, et al.;* and

WHEREAS the Court of Appeals has issued an order denying said petition, a copy of which is appended hereto as Exhibit A; and

WHEREAS the plaintiffs-appellants in *Christensen* intend to petition the United States Supreme Court for a writ of certiorari and to ask the Supreme Court to consider the issue of the applicability of the statute of limi-

tations in 28 USC § 2401(a) to actions brought under 25 USC § 345; and

WHEREAS the government and the plaintiffs herein are in agreement that the interests of justice would be served by deferring further action in the instant case until the U. S. Supreme Court has had an opportunity to dispose of the *Christensen* case; and

WHEREAS the parties have previously stipulated that the initial stay in this matter was without prejudice to their right to seek a further stay pending action by the U. S. Supreme Court.

NOW, THEREFORE, in light of the foregoing, plaintiffs and defendants, by and through their respective counsel, hereby stipulate as follows:

1. That further proceeding in this case, including proceedings related to the government's motion to dismiss the complaint, may be stayed pending a final disposition of *Christensen et al. v. United States of America, et al.*, by the United States Supreme Court.

2. That the parties hereby undertake to notify the court of any final disposition of the *Christensen* case by the U. S. Supreme Court.

DATED this 2 day of August, 1985.

FAULKNER, BANFIELD,
DOOGAN & HOLMES

By: /s/ Richard B. Brown
Attorneys for Plaintiff

Michael R. Spann
United States Attorney

By: /s/ Deborah Smith, Assistant
U. S. Attorney, Attorney
for Defendants

ORDER

IT IS SO ORDERED this 10 day of August, 1985

cc: Richard Brown (FAULKNER)
Mark Rindner, AUSA

/s/ H. Russel Holland
U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1971

D.C. No. CV R-83-93

ELAINE CHRISTENSEN, ORVILLE BROWN, DORAN PETE and GLADYS WALKER,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ORDER

(Filed June 7, 1985)

Appeal from the United States District Court
For the District of Nevada

Before: WALLACE, HUG, and SKOPIL, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

Richard B. Brown, Esq.
FAULKNER, BANFIELD,
DOOGAN & HOLMES
2550 Denali St., Suite 700
Anchorage, AK 99503
Telephone: (907) 274-0666

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A83-593

SHIRLEY KENDALL and KELLY ST. CLAIR,
Heirs of Frank St. Clair,

Plaintiffs,

vs.

WILLIAM P. CLARK, Secretary of the U. S.
Department of the Interior, and
THE UNITED STATES OF AMERICA,

Defendants.

COMPLAINT

(Filed December 1, 1983)

COMES NOW the plaintiffs, Shirley Kendall and Kelly St. Clair, heirs of Frank St. Clair, and allege as follows:

I. PRELIMINARY STATEMENT

1. Plaintiffs, heirs of Frank St. Clair, seek declaratory and equitable relief which will have the effect of regaining from the defendants title to a 9.4 acre allotment of land granted to Frank St. Clair by the United States

of America in 1941 and located at the head of Berg Bay in Glacier Bay National Monument. Defendant United States wrongfully accepted a deed to this parcel from Frank St. Clair in January of 1956 in violation of the trust obligations owing to Mr. St. Clair as an Alaska Native and the express provisions of the Act of May 17, 1906, the Alaska Native Allotment Act, 34 Stat 197.

II. PARTIES.

2. Plaintiff Kelly St. Clair, a Tlingit Indian, is a resident of Hoonah, Alaska.

3. Plaintiff Shirley Kendall, a Tlingit Indian, is a domiciliary of Anchorage, Alaska, currently residing in Cambridge, Massachusetts.

4. Plaintiffs are the sole surviving children of Frank St. Clair, who died in 1958. Plaintiffs are heirs to his estate and, as such, have succeeded to his rights to the real property which is the subject of this litigation.

5. Defendant William P. Clark is the Secretary of the U.S. Department of the Interior and has been joined herein in his official capacity. He is responsible for overseeing all operations of said Department, including the operations of the National Park Service and the Bureau of Indian Affairs.

6. The United States of America is joined as a defendant pursuant to the terms of the 5 U.S.C. § 702.

III. JURISDICTION.

7. This Court has jurisdiction over this matter pursuant to the terms of 28 U.S.C. §§ 1331, 1353, and 2201 and 25 U.S.C. § 345.

IV. STATEMENT OF FACTS

8. On April 5, 1915, Frank St. Clair, a Tlingit Indian residing in Hoonah, Alaska, applied for an allotment of land pursuant to the Act of May 17, 1906, the Alaska Native Allotment Act, 34 Stat 197. The approximately 160 acres described in Mr. St. Clair's application is located on the shores of Berg Bay in what is now Glacier Bay National Monument. Mr. St. Clair's application states that he had personally used and occupied the land described therein since his birth in 1886.

9. By decision dated October 24, 1930, the U.S. Department of the Interior (hereinafter "Department") approved Mr. St. Clair's allotment application and granted him a parcel containing 9.4 acres. The parcel was surveyed and is now designated as U.S. Survey 1954.

10. On August 28, 1941, the Department executed a certificate to U.S. Survey 1954 approving the allotment application of Frank St. Clair pursuant to the terms of the Act of May 17, 1906. This certificate stated, in pertinent part, that the land in U.S. Survey 1954

> . . . shall be deemed to be the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and non-taxable until otherwise provided by Congress.

11. Mr. St. Clair's personal use of the land granted to him in the Department's certificate pre-dated all orders

and proclamations withdrawing the land from disposition under the public land laws. The land ultimately allotted to him was, thus, available for allotment, and the Department's decision that he was entitled to a Native allotment on land encompassed by his application was a lawful one.

12. Throughout the 1930s and 1940s, Frank St. Clair and his children, including plaintiffs herein, travelled from Hoonah to his Native allotment on a regular basis, usually residing there from May until early autumn. The St. Clair family constructed a house, smoke house, storage building, strawberry garden, and reservoir on the allotment and engaged in subsistence hunting, fishing, and gathering on the allotment and in the area adjacent thereto.

13. Beginning in the 1940s and continuing until 1956, personnel employed by the Department's National Park Service and Bureau of Indian Affairs repeatedly made express representations to Frank St. Clair and to plaintiffs that (a) it was unlawful for Mr. St. Clair to hold title to a Native allotment in Glacier Bay National Monument, (b) that if he did not agree to sell his Native allotment to the United States, the Department would take the land from him without compensation, and (c) that improvements he and his family had constructed on the allotment were worthless.

14. The representations described in Paragraph 13 above were false and the agents of the Department making said representations knew, or had reason to know, that they were false. Said representations were made with the intent of obtaining a relinquishment of Mr. St. Clair's interest in U.S. Survey 1954.

15. As a direct result of and in reliance on the representations described in Paragraph 13 above, Frank St.

Clair solicited purchase offers from the Department. If these representations had not been made, Frank St. Clair would have refused to convey title to his allotment and plaintiffs, as his heirs, would have succeeded to an undivided interest therein.

16. On November 21, 1955, Frank St. Clair executed a deed to U.S. Survey 1954 naming the United States of America as the grantee and reciting a consideration of $891.00 "in hand paid". This deed was approved and accepted by the Department on January 27, 1956.

17. Frank St. Clair never received the $891.00 cash consideration recited in his deed. Instead, the money was deposited in an account maintained by the Bureau of Indian Affairs and paid by the Bureau to the Federal Public Housing Administration to cover interest and principal due on the puchase by Mr. St. Clair of a house in Hoonah from the Public Housing Administration. Plaintiffs are informed and believe that the Bureau of Indian Affairs knew, or had reason to know, that the Public Housing Administration was not actively pursuing collection of loans made for the purchase of homes by residents of Hoonah, including Frank St. Clair. All such loans were ultimately forgiven by the United States government.

18. On September 8, 1983, plaintiffs demanded that defendants cancel the deed executed by Frank St. Clair and return title to U.S. Survey 1954 to his heirs. Defendant rejected the demand on October 24, 1983.

V. CLAIMS FOR RELIEF.

A. First Claim For Relief.

19. Plaintiffs reallege each and every allegation in Paragraph 1 through 18 above.

20. The Act of May 17, 1906, the Alaska Native Allotment Act, reads, in pertinent part, as follows:

> The Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of non-mineral land in Alaska to any Indian or Eskimo of full or mixed blood who resides and is a native of Alaska, and who is the head of a family or is 21 years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity and *shall be inalienable* and non-taxable until otherwise provided by Congress.

(Emphasis added)

20. The restriction on alienation contained in the Alaska Native Allotment Act existed until passage of the Act of August 2, 1956, 70 Stat. 954, an amendment authorizing alienation of Native allotment with the approval of the Department. The deed to U.S. Survey 1954 was executed by Frank St. Clair and approved and accepted by the Department before passage of the Act of August 2, 1956, and is, therefore, void.

21. Defendants, by refusing to relinquish their claim to U.S. Survey 1954 and return title to said realty to the Estate of Frank St. Clair have unlawfully denied and excluded plaintiffs from a Native allotment to which they are entitled by virtue of their descent from Frank St. Clair and the Act of May 17, 1906.

22. Pursuant to 25 U.S.C. § 345, plaintiffs are entitled to a decree of this Court declaring that the conveyance of U.S. Survey 1954 is void and the heirs of Frank St. Clair should receive title thereto.

B. Second Claim For Relief.

23. Plaintiffs reallege each and every allegation in Paragraphs 1 through 18 above.

24. Defendant United States of America, acting through its employees and agents in the National Park Service and the Bureau of Indian Affairs, procured a conveyance of Frank St. Clair's Native allotment as a result of duress and misrepresentations more particularly described in Paragraphs 13 to 17 above.

25. As a result of the duress and misrepresentations communicated to Frank St. Clair and to plaintiffs by agents and employees of defendant United States of America, the purported conveyance of U.S. Survey 1954 is void and must be rescinded.

C. Third Claim For Relief.

26. Plaintiffs reallege each and every allegation in Paragraphs 1 through 18 above.

27. Defendant United States of America owes a fiduciary obligation to all recipients of allotments under the Alaska Native Allotment Act. This fiduciary duty extended to Frank St. Clair and plaintiffs herein at all times pertinent to this action.

28. Under the fiduciary duty described in Paragraph 27 above, defendants are obligated to assure that

allotments of land are not conveyed under terms which are unlawful or disadvantageous to the allottee and his heirs.

29. Defendant United States of America and the Department breached their fiduciary obligations to Frank St. Clair and plaintiffs by:

(a) Failing to properly inform them of their rights under the Act of May 17, 1906,

(b) Utilizing duress and misrepresentations to obtain a conveyance of U.S. Survey 1954,

(c) Failing to arrange for adequate consideration for the conveyance, and

(d) Misappropriating the consideration which was paid for the conveyance.

30. Breaches of fiduciary duty outlined in Paragraph 29 above and associated with the conveyance of U.S. Survey 1954 render that conveyance void.

VI. PRAYER FOR RELIEF.

WHEREFORE, plaintiffs pray as follows:

1. For a judicial declaration that the conveyance of U.S. Survey 1954 was unlawfully procured and is, therefore, void and that the heirs of Frank St. Clair should receive title thereto.

2. For a decree directing defendants to reconvey title to U.S. Survey 1954 to the Estate of Frank St. Clair.

3. For costs and attorneys fees in accordance with 28 U.S.C. § 2412.

4. For such other and further relief as the Court may deem proper.

Respectfully submitted this 30th day of November, 1983.

FAULKNER, BANFIELD,
DOOGAN & HOLMES

By: /s/ Richard B. Brown
Attorney for Plaintiffs